APPENDIX B

# REPORT OF THE COMMITTEE ON LAW AND LEGISLATION*

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## Introduction

Court decisions which address important labor law and arbitration-related issues are almost as "numerous as the stars." If one were to read and classify these cases uniformly for later use or instruction, the reader and annotator would actually have no time to work at this great profession. But this is not to say that the professional can safely confine himself or herself to the parties' contract, negotiation history, the common law of the shop, and the industry. Court decisions and opinions are unusually instructive touchstones and, because of the broad-ranging subjects addressed in these opinions which more often than not overlap or are congruent with grievances submitted to us, the Committee believes that it is very important to study these sources. Actually, these labor law cases give unusually helpful direction to our work. Citations listed are to the original publication or to the various reporter services.

## Case Summaries

*The Roles of the Arbitrator, the Labor Board, and the Courts*

The tensions existing between the courts, arbitrators, and Labor Board continue unabated. If anything, the level is actually increasing. To the Chairman, one of the great labor law scholars sitting in the federal courts is Chief Judge Irving R. Feinberg of

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the U.S. Court of Appeals, Second Circuit.[1] Reading his opinion in *Emery Air Freight Corp. v. Teamsters Local 295*[2] is immensely rewarding. This decision etches more precisely than any other I am aware of the differing roles of the arbitrator, the Labor Board, and the courts. The issues addressed are the duty to arbitrate subsequent to the expiration of a collective bargaining agreement, whether a union's strike over an arbitrable issue—in the presence of a no-strike provision—constitutes a waiver of the right to arbitrate the dispute, and whether an injunction against the strike should issue because the employer would suffer irreparable harm if forced to arbitrate. Judge Feinberg says the injunction should not issue in these circumstances because "[t]he monetary cost of arbitration certainly does not impose such legally recognized irreparable harm. . . . Nor is the pendency of the same issues before the NLRB a basis for staying arbitration. . . . [T]he proceeding before the NLRB 'was administrative only, neither formally adversarial nor like a trial. As such, it has no collateral estoppel effect.' "[3] He also says that "although arbitral awards are not easily upset in this circuit, . . . should the arbitrator issue one that is irrational or clearly contrary to federal law, we trust it will not stand up under judicial scrutiny."[4]

In another case, *NLRB v. Paper Manufacturing Co.*,[5] arbitrators are cautioned not to arbitrate representation issues. Included are successorship and accretion issues because these issues are matters exclusively relegated to the Labor Board under Section 9 of the National Labor Relations Act, 29 U.S.C. Section 159 (1982). In direct terms the court says that the Board *will not* defer to an arbitrator's award resolving representation disputes because "the arbitrator has no legal authority" to make these decisions. In this case an arbitrator did make a representation decision and, of course, the award was vacated. These matters are often referred to as a bargaining unit determination. Ironically, in *Paper Manufacturers,* the employer and the union submitted the representation issue to arbitration.

In an interesting case decided by the Ninth Circuit Court of Appeals, *R.B. Electric, Inc. v. Electrical Workers (IBEW) Local*

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[1]Another is Judge Richard A. Posner of the U.S. Court of Appeals, Seventh Circuit, and, of course, our own Chief Judge Harry T. Edwards of the U.S. Court of Appeals, D.C. Circuit.

[2]768 F.2d 93, 121 LRRM 3240 (2d Cir. 1986).

[3]*Id.*, 121 LRRM at 3245–3246.

[4]*Id.*, 121 LRRM at 3246.

[5]786 F.2d 163, 121 LRRM 3278 (3d Cir. 1986).

*569*,[6] the court held that a party may successfully avoid arbitration on the ground that a contract clause is illegal only if the contract clause "on its face violates federal labor law or is contrary to federal labor policy." But if the arbitrator can interpret the disputed contract clause in a manner that would render it lawful the court will direct that arbitration proceed. This case involved a "hot cargo" contract provision which, under special circumstances, could be interpreted by an arbitrator as being consistent with federal labor law. Thus, the arbitrator would be duty bound to survey "all possible interpretations of the contract provision" to settle on one that would not result in a conflict with federal labor law. Would this not require the arbitrator to do extensive research in "external law"?

In similar fashion the Ninth Circuit Court of Appeals in *Local Joint Executive Board v. Royal Center, Inc.*,[7] held that "an NLRB refusal to issue a complaint . . . cannot prohibit the unions from obtaining relief from the dispute resolution system for which they bargained—arbitration." This is a case where the issue involved the "essentially factual" determination of whether an alter ego relationship exists. "In cases involving issues of fact or contract interpretation the NLRB's refusal to issue a complaint does not act as res judicata or bar a party from seeking arbitration under the collective bargaining agreement."

*Subcontracting in the Federal Sector*

In the federal public sector, the Supreme Court has been asked to decide whether a federal agency, in compliance with an OMB circular related to contracting-out determinations, is required to negotiate with the union representing the agency's employees over contracting-out unit work. By a divided court of appeals, *EEOC v. Federal Labor Relations Authority*,[8] the court held that the agency was required to bargain and the contractual grievance machinery could be the vehicle to challenge management's exercise of its right to contract out.

This case was to be argued before the Supreme Court on January 22, 1986. On April 29, 1986, however, the Supreme Court dismissed the writ of certiorari as "improvidently

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[6]781 F.2d 1440, 121 LRRM 3123 (9th Cir. 1986).
[7]796 F.2d 1159 (9th Cir. 1986).
[8]744 F.2d 842, 117 LRRM 2625 (D.C. Cir. 1984).

granted." Justice White and Justice Stevens dissented from the dismissal.[9]

*Stay of Order to Arbitrate Pending Appeal*

In *Graphic Communications Local 2 v. Chicago Tribune Co.*,[10] a union brought suit to compel arbitration of the company's decision to hire some employees directly rather than through the union's hiring hall. The district court granted the order to arbitrate. The defendent company's request to the district court to stay the order pending appeal was denied, and the Seventh Circuit affirmed that denial.

Judge Richard Posner, a strong advocate of protecting the independence of labor arbitration, wrote for the panel. He rejected the company's claim that being required to arbitrate pending appeal would cause it "irreparable injury." The expense of presenting the matter in arbitration is not irreparable. Furthermore, to allow a stay would defeat the policies of the *Steelworkers* Trilogy: "Arbitration is supposed to be swift. It would not be swift if orders to arbitrate are routinely stayed pending appeals. . . ."[11]

Judge Posner stated that it would be difficult to imagine any case where a stay of arbitration should be granted pending appeal from an order to arbitrate. In fact, he issued the following caution:

> We are concerned that some companies may be trying to reduce the credibility of unions by dragging out the grievance process in collective bargaining agreements by means of pertinacious challenges to orders to arbitrate, a tactic we do not wish to encourage. . . . We shall not impose sanctions in this case; but let this opinion be a warning.[12]

The opinion strongly reaffirms the core policies of the Trilogy by facilitating the resolution of grievance disputes through the parties' own processes without delay.

*Pension Trust Fund Contributions and Public Policy*

*Automobile Workers v. Keystone Consolidated Industries, Inc.*:[13] Since 1955, Keystone Consolidated Industries, Inc. (employer)

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[9]*EEOC v. Federal Labor Relations Auth.*, 54 USLW 4408, 122 LRRM 2081 (1986).
[10]121 LRRM 2052 (7th Cir. 1985).
[11]*Id.*, 121 LRRM at 2053.
[12]*Id.*, 121 LRRM at 2053–2054.
[13]782 F.2d 1400, 121 LRRM 2702 (7th Cir. 1986).

and the UAW (union) have been parties to a series of pension agreements. Beginning in 1968 and continuing to the present, these pension agreements have provided that the Employer shall make contributions to the pension's trust fund on an annual basis.

In June 1981, the employer issued a summary annual report to the pension plan's participants, the members of the union, as required by ERISA. In this report, the employer revealed that it had sought and was granted a waiver of its 1979–1980 pension plan contribution pursuant to Section 303 of ERISA in December 1980. This provision empowers the Secretary of the Treasury to waive ERISA's statutory minimum funding requirement for a given plan year after the Secretary considers the financial condition of the employer and the effect of such a waiver on the employees.[14]

When the employer declined to make the annual contribution to the pension's trust fund, the union grieved the contractual violation. The arbitrator sustained the grievance but the employer refused to comply with the award. The union then filed a Section 301 suit under the LMRA. The district court sustained the award, which was appealed to the Seventh Circuit Court of Appeals on grounds of public policy.

On appeal, the employer argued that the district court erred as a matter of law in enforcing the arbitrator's award because the award conflicted with the public policies embodied in ERISA. The employer claimed that the safeguards embodied in the waiver provision of ERISA could not be overridden by a pension agreement because they were enacted for the benefit of pension plan participants.

In its discussion of the standards for a court's review of labor arbitration awards, the Seventh Circuit stated, "[t]he Supreme Court has held that one of the bases that a court can rely on in declining to enforce an arbitration award is that the award is contrary to public policy."[15] The public policy, however, must be "well defined and dominant" before a court can decline to enforce an award on public policy grounds. Moreover, public policy can be ascertained "by reference to the Constitution, treaties, federal statutes, and applicable legal precedents rather

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[14]29 U.S.C. §1083(a).

[15]*Automobile Workers, supra* note 13, 121 LRRM at 2703–2704, citing *W.R. Grace Co. v. Rubber Workers Local 759,* 461 U.S. 757, 766, 113 LRRM 2641 (1983).

than by reference to general considerations of supposed public interests."[16] Lastly, the court stated, "[b]efore declaring that an arbitral award violates public policy, however, courts have noted that extreme caution should be exercised in determining what that public policy is."[17]

Based on these guidelines surrounding the public policy standard, the Seventh Circuit ruled that the arbitrator's refusal to apply the waiver provision of ERISA when interpreting the annual funding requirement of the pension agreement violated the clearly defined public policy behind the enactment of ERISA.

Circuit Judge Coffey dissented.

*The "Essence of the Agreement" and Public Policy*

In *Postal Workers v. United States Postal Service,*[18] Circuit Judge Harry T. Edwards delivered a unanimous opinion in which the Court of Appeals for the District of Columbia Circuit reversed the judgment of the trial court which had refused to uphold an arbitrator's award.

The arbitration involved a grievance brought by the union on behalf of an employee who had been fired for alleged dishonesty in handling postal transactions. The arbitrator refused to admit incriminating statements made by the grievant because he had not been given a Miranda-type warning. As a result, grievant was reinstated without back pay. When the Postal Service refused to comply with the award the union brought suit in the district court to enforce the award. The district court vacated the award on the basis that the award was an erroneous interpretation of the contract.

The court of appeals reversed, asserting that a court has no authority to discard a labor arbitration award which is concededly based on the collective bargaining agreement and then substitute its own view of the proper interpretation of the contract. The collective bargaining agreement at issue stated that under the contract the Postal Service promises to comply with applicable laws. The arbitrator plainly had the authority to con-

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[16] *Id.*, 121 LRRM at 2704, citing *W.R. Grace Co.*, 461 U.S. at 766.

[17] *Id.*, 121 LRRM at 2704. *Accord Meat Cutters Local 540 v. Great W. Food Co.*, 712 F.2d 122, 124, 114 LRRM 2001 (5th Cir. 1983); *Transportation Employees v. Oil Transport Co.*, 591 F. Supp. 439, 443, (N.D. Tex. 1984).

[18] 122 LRRM 2094 (D.C. Cir. 1986).

sider legal rules, including the possible requirement of a Miranda warning, in construing the contract. The court noted that whether the arbitrator's judgment regarding the applicability of *Miranda* to the situation at hand was correct was irrelevant. It concluded that the district court's decision was contrary to the legal principles enunciated in *United States v. Enterprise Wheel & Car Corp.*,[19] and *W.R. Grace Co. v. Rubber Workers Local 759*.[20]

Citing the works of Academy members Theodore St. Antoine[21] and David Feller[22] as precisely consistent with the views enunciated by the Supreme Court, the opinion notes that an award will not be vacated even though the arbitrator may have made, in the eyes of the judges, errors of fact and law "unless it compels the violation of law or conduct contrary to accepted public policy."[23]

The court notes that the public policy exception is extremely narrow and is designed to limit the potentially intrusive judicial review of arbitration awards under the guise of "public policy." Arbitration awards may not be enforced if they transgress well-defined and dominant laws and legal precedents. Judges have no license to impose their own brand of justice in determining applicable public policy. The exception applies only when the public policy emanates from clear statutory or case law, not from general considerations of supposed public interest.

The case of *Misco v. Paperworkers*,[24] involved disciplinary action. Here the Fifth Circuit upheld the lower court's vacation of an arbitration award on the basis that the award contravenes public policy and thus should not be enforced.

The court puts down the arbitrator rather soundly, calling the opinion "whimsical" and the reasoning of the arbitrator "curious." The court also points out that the arbitrator is not an attorney, but an engineer, but still does not excuse that lack of legal background for what it deems an improper decision.

Briefly, in this case the arbitrator did not find sufficient proof of the alleged misconduct and refused to consider evidence about the grievant's actions that came to light *after* the

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[19]*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).
[20]461 U.S. 757, 113 LRRM 2641 (1983).
[21]*Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 Mich. L. Rev. 1137 (1977).
[22]*A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663 (1973).
[23]*Supra* note 18, 122 LRRM at 2099.
[24]768 F.2d 739, 120 LRRM 2119 (5th Cir. 1985).

employer's action to discharge the grievant. The court evaluated the record as establishing the misconduct (possession/use of marijuana on work premises), noting: "Gazing at the tree, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy."[25]

Judge Tate wrote a detailed dissent, pointing out that the court, in his opinion, has gone beyond its authority in reviewing the award by questioning the arbitrator's factual evaluation of the evidence, the interpretation of the contract provision involved, and the procedural ruling with respect to admission of postdischarge evidence.

These cases indicate an activist stance by the courts in getting involved in the arbitration process. For arbitrators, the message is that we should try to be clear in our analysis of the evidence and if we make an award that arguably conflicts with contract language, we should spell out in our decisions that we find the language ambiguous or unclear.

However, in *Premium Building Products Co. v. Steelworkers,*[26] the court found under the facts of that case that public policy does not require that anyone smoking marijuana at his workplace is subject to discharge in all cases. In *Bechtel Constructors v. Detroit Carpenter Dist.,*[27] the court found that the arbitrator's finding that a plant rule against using drugs did not apply to the grievant was not so manifestly erroneous that the court would refuse to enforce the arbitrator's decision.

*Fashioning Remedy by the Arbitrator*

If the parties have prescribed a remedy in plain and unambiguous language which applies to the particular contractual violation, the arbitrator is to follow it.[28]

As to the award of attorney fees by an arbitrator, the court stated in *Sammi Line Co., Ltd. v. Altamar Navegacion S.A.,*[29] "Since the traditional American rule is that attorneys' fees are generally not awarded, and the arbitrators may decide only issues submitted for arbitration, the burden is on respondent to demonstrate

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[25]*Id.*, 120 LRRM at 2122.
[26]616 F. Supp. 512 (D. Ohio 1985).
[27]610 F. Supp. 1550 (D. Mich. 1985).
[28]*Operating Eng'rs Local 9 v. Shank-Artukovich*, 751 F.2d 364, 118 LRRM 2157 (10th Cir. 1985).
[29]605 F. Supp. 72 (S.D.N.Y. 1985).

that an award of attorneys' fees was within the scope of the arbitrable issues. . . . Respondents can not validly assert the existence of a custom so universal that the parties may be deemed to have agreed to arbitration with an understanding that attorneys' fees might be awarded. Instead, the general understanding is to the contrary."[30]

*Retention of Jurisdiction by Arbitrator*

In *Hilton International Co. v. Union de Trabajadores Local 610*,[31] the arbitrator awarded back pay to a waiter, including tips. He retained jurisdiction to determine the amount of tips if the parties were unable to agree. The employer argued that the award should be set aside for incompleteness. In disagreeing the court wrote:

> Rather than having the parties go through all the steps of the grievance procedure again to obtain a determination of this matter through another arbitration case, it was proper, for the sake of procedural economy, to retain jurisdiction. . . . after ordering reinstatement and back pay, to determine the amount of earnings lost by the discharged employee. . . . Of course, the arbitrator shall be limited solely to determine the back pay liability, including tips, should there be any controversy in connection therewith.[32]

*Expiration or Termination of Collective Bargaining Agreement*

Where the expired or terminated contract contains no negating provision and the grievant's claim was created by, or during the term of, such contract or arose out of the prior contractual relationship, the fact that the contract expired or was terminated before the dispute ripened into a grievance does not destroy the employer's duty to arbitrate.[33]

*Retired Employees*

The duties of the parties with respect to retired employees were stated, as follows, in *Quick Air Freight v. Teamsters Local 413*:[34]

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[30]*Id.* at 73–74.
[31]600 F. Supp. 1446, 119 LRRM 2011 (D.P.R. 1985).
[32]*Id.*, 119 LRRM at 2015.
[33]*Boilermakers v. Delta S. Co.*, 602 F. Supp. 625 (M.D. La. 1985); *Sheet Metal Workers Local 420 v. Huggins Sheet Metal, Inc.*, 752 F.2d 1473, 118 LRRM 2603 (9th Cir. 1985).
[34]613 F. Supp. 1263 (D. Ohio 1984).

> Retirees are an entirely separate class from active employees and possess few of the rights accorded active employees under federal labor law. The employer has no duty to bargain with the union regarding retired employees and may unilaterally modify benefits due them under a collective bargaining agreement without commiting an unfair labor practice. . . . This does not mean, however, that when a union bargains for benefits due retirees—as Local 413 claims it did in this case—that the retirees are without protection. As the Supreme Court stated in *Pittsburgh Plate Glass,* the retirees have a federal remedy under section 301 for breach of contract if the bargained for benefits are unilaterally terminated by the former employer. . . . It is equally clear that the union has standing to bring such an action on behalf of those retirees: as a signatory to the contract, a union can bring an action for the third party beneficiaries.[35]

*State Judicial Deference to Arbitrator's Award*

*Iowa City Community School District v. Iowa City Educational Association*:[36] In March 1980 the Iowa City School District froze the salary of a social studies teacher, denying the teacher his contractual step increase. The reason given for taking this action was his unsatisfactory service. The teacher filed a grievance contesting this determination and his grievance was sustained. On appeal, the Iowa Supreme Court sustained the award. It held that a labor arbitrator's award reversing a public school district's determination that a teacher's performance was unsatisfactory is subject to a narrow scope of review modeled on federal precedent, and neither an arbitrator's mistaken conclusion on issues of fact or law nor a public policy favoring quality education justifies vacating the award. The case is important in announcing the rule that the same principles of judicial deference to an arbitrator's award applicable in federal courts govern state court policy as well. The decision was by a divided court five to four with the Chief Justice dissenting and writing the opinion for his three colleagues. He says that the importation of and reliance on federal decisions is "indiscriminate" because these decisions "are of little applicability in view of the restrictive and unique provisions of Iowa's Public Employment Relations Act."[37]

The writer strongly suggests that arbitrators hearing teacher evaluation grievances read both opinions. They suggest to the

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[35]*Id.* at 1272–1273.
[36]343 N.W.2d 139, 116 LRRM 2832 (Iowa 1983).
[37]*Id.*, 116 LRRM at 2837.

arbitrator that he or she must be prepared to make decisions involving differing policy considerations. The opinions are the subject of a lengthy note by Peter Pashler, Member of the Iowa Public Employees' Relations Board.[38]

[38]35 Drake L. Rev. 249 (1985–1986).